83-1424

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ALEXANDER L. STEVAS,
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO.

JACK BROCK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 83-5071

(Non-Argument Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JACK BROCK,

Defendant-Appellant.

Appeal from the United States
District Court For the
Southern District of Florida

(November 15, 1983)

Before HATCHETT, ANDERSON, and CLARK, Circuit Judges.

PER CURIAM:

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Jack Brock was charged with various drug-related offenses.[1] He argued that evidence had been obtained illegally following a warrantless arrest, and the district court ordered the evidence suppressed. On appeal, this circuit reversed the district court, holding, inter alia, that Brock's arrest had been justified by "exigent circumstances." United States v. Marszalkoski, 669 F.2d 655 (11th Cir. 1982). The case was remanded for trial and Brock was found guilty on all counts.

On appeal, Brock alleges that the court below improperly denied his motion to suppress. Because the Marszalowski panel considered the issue

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[1]The offenses primarily involved the possession and distribution of cocaine. See 21 U.S.C. §§846, 841(a)(1), 843(b) and 18 U.S.C. §2.

and held that there were "exigent circumstances," the threshold question is whether the "law of the case" doctrine bars reconsideration. We conclude that it does.

The "law of the case" doctrine binds both the district court and the court of appeals to findings of fact and conclusions of law made by the appellate court in a prior appeal of this same case. United States v. Robinson, 690 F.2d 896 (11th Cir. 1982); Lincoln National Life Ins. Co. v. Roosth, 306 F.2d 110 (5th Cir. 1962).[2] It is not a limit upon the court's jurisdiction,

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[2]In Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc), this court adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981. Id. at 1209.

but a doctrine designed to promote finality by respecting an earlier appellate opinion. White v. Murtha, 377 F.2d 428, 431 (5th Cir. 1967).

The doctrine is not absolute, however, and it is well established that an issue may be reconsidered when "(1) a subsequent trial produces substantially different evidence, (2) controlling authority has since made a contrary decision of law applicable to that issue, or (3) the prior decision was clearly erroneous and would work manifest injustice." United States v. Robinson, 690 F.2d at 872.

Brock alleges that facts developed during his second trial were so "substantially" different that this appeal warrants reconsideration. Having reviewed the record, we do not believe

that the three factual differences claimed by Brock are "substantial.[3] Taken in combination, they do not so undermine the court's rationale in United States v. Marszalowski, supra, that the need for a fresh analysis of "exigent circumstances"

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[3]Brock claims that federal agent Brown testified at the second trial that Brock had no idea that drug agents would be coming to his home. There is no indication that this testimony represents a difference from that presented in the first trial; the first panel did not mention impending presence of drug agents in its examination of "exigent circumstances." Brock also claims that Agent Brown "admitted" at the second trial that Brock had no expectation that informant Bennett would arrive at his house on the night of the arrest. The record gives no support for that characterization of Brown's testimony. Finally, Brock claims that Agent Brown changed his testimony from the first trial, testifying that he saw two figures "leaving Brock's house rather than "entering and leaving" it. This change is inconsequential.

is indicated. That holding must therefore stand.

AFFIRMED.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Petitioner's Appendix to Petition for Writ of Certiorari was mailed this ____ day of February, 1984 to United States Solicitor General, Washington, D.C. and to STANLEY MARCUS, U.S. Attorney, 155 So. Miami Avenue, Miami, Florida 33130.

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